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March 9, 2015

PSC STAFF OPINION 2014-015A

W. Brent Rice
McBrayer Attorneys at Law
201 East Main Street, Suite 900
Lexington KY 40507

Re: Tower Access Group request for reconsideration of Advisory Opinion regarding Commission jurisdiction over construction of wireless cellular tower on Eastern Kentucky University property

Dear Mr. Rice:

Commission Staff acknowledges receipt of your December 1, 2014 letter in which you request reconsideration of a Staff Opinion issued on November 13, 2014. In support of your request, you provide additional facts that were not provided in your original request for a Staff Opinion on the issue of whether the Commission has jurisdiction to issue a Certificate of Public Convenience and Necessity ("CPCN") for the construction of a proposed cellular tower to be located on the campus of Eastern Kentucky University ("EKU") in Richmond, Kentucky. This letter represents Commission Staff's interpretation of the law as applied to the facts presented in your request for reconsideration. This opinion is advisory in nature and not binding on the Commission should the issues herein be formally presented for Commission resolution.

Based upon your December 1, 2014 letter, Commission Staff understands the additional facts as follows: EKU issued a Request for Proposal ("RFP") for construction of a monopole "telecommunication tower" to expand cellular telephone service on its campus and surrounding areas. The telecommunications tower was to serve as an alternate location for cellular sites located on university buildings. You characterize the proposal as "speculative" in that no formal agreements were executed with cellular service providers to use the proposed tower. The winning bidder would build, maintain, and operate the tower for a fifteen-year period, with certain renewal options. EKU awarded the contract to your client, Tower Access Group ("TAG") on March 7, 2013, and the parties executed a master lease agreement ("lease agreement") in November 2013. Under the terms of the lease agreement, the tower would remain the sole property of TAG upon the expiration of the lease agreement. After the lease agreement

was executed, TAG undertook activity necessary to begin construction of the telecommunication tower, including securing approval from those regulatory authorities from whom TAG believed approval was required. TAG did not have agreements with wireless carriers regarding use of the telecommunications tower until August 2014. As of your December 1, 2014 letter, you state that the telecommunications tower is fully constructed and complete except for utilities being connected to the site.

In the November 13, 2014 advisory opinion, Commission Staff determined that, based upon the facts you had presented, the Commission has jurisdiction over the construction of the proposed wireless cellular tower because the construction is exempt from the local planning agency's authority under KRS 100.361(2) due to the site being physically located on university property whose title is vested in the Commonwealth. Therefore, pursuant to KRS 278.650, a CPCN application must be filed and prior Commission approval granted before construction begins.

In your letter seeking reconsideration of the advisory opinion, you request that Commission Staff: (1) reconsider and reverse the November 13, 2014 Commission Staff opinion by finding that the Commission does not have jurisdiction over the construction of the telecommunications tower on ECU property; and (2) if Commission Staff does not reverse its Opinion, inform TAG of the required actions needed to bring the tower into regulatory compliance.

You state that TAG requested the original Commission Staff opinion when a third party requested verification of TAG's belief that the Commission did not have jurisdiction to issue a CPCN for the telecommunications tower to be constructed on ECU property. You also state that TAG did not apply to the Commission for a CPCN prior to constructing the telecommunications tower because TAG concluded that: 1) no CPCN application had ever been filed with the Commission by a tower company acting on its own without a wireless telephone carrier as a co-applicant; and 2) based upon a previous Commission Staff opinion letter (a copy of which you have been unable to produce or locate), stating that the Commission had a policy of deferring to a local planning commission for the regulation of telecommunications tower construction when a tower was built within the local planning commission's geographic boundary.

In support of your request for reconsideration, you state that TAG is not the type of entity and the tower is not the type of structure that the Commission regulates under its statutory and regulatory framework.

Regarding your conclusion that TAG is not the type of entity the Commission regulates, you state that 807 KAR 5:063, which governs CPCN applications, applies "without exception" only to a utility. You note that KRS 278.010(3) (e) defines a utility as:

[a]ny person...who owns, controls, operates, or manages any facility used or to be used for or in connection with...[t]he

transmission or conveyance over wire, in air, or otherwise, of any message by telephone or telegraph for the public, for compensation.

You also state that TAG is not a utility as defined in KRS 278.010(3) since TAG is a company engaged in the business of providing cell tower infrastructure, but does not provide telecommunications services for the public. You further state that the Kentucky legislature gave a "clear indication," by way of planning and zoning statutes that it did not intend for a business providing cell tower infrastructure to be considered a "utility." You note that KRS 100.987, which controls local government regulation of cellular antenna towers, distinguishes between a "utility" and "a company that is engaged in the business of providing the required infrastructure to a utility," and therefore, the Legislature intended that a business providing only cell tower infrastructure is "something different than the utility."

You state that had TAG applied for a CPCN, it would have done so as an entity other than a utility, acting on its own without a formal relationship with a cellular telephone provider, and thus TAG would have been the first such entity ever required to apply for a CPCN under those circumstances.

Regarding your conclusion that the telecommunications tower is not the type of entity the Commission regulates, you state that, under the Commission's own internal policy set forth in a previous Staff Opinion, the Commission defers to local planning commissions regarding the construction of telecommunications towers located within the geographical boundary of the local planning commission. You also state that Richmond, Kentucky, city officials believed that the Richmond Planning Commission had jurisdiction to regulate the tower, but that the Planning Commission's approval was not required because the property at issue is state property. You also cite to a dissent in *Kentucky Public Service Com'n v. Shadoan*, 325 S.W.3d 360, 367 (Ky. 2010) (Scott, J., dissenting) to support your conclusion that the city of Richmond, and not the Commission, had jurisdiction over the construction of the tower.

Commission Staff notes that in your first request for an opinion, you stated that the structure was to be "a communication tower to be utilized by wireless carriers," which Commission Staff interpreted to be an "antenna tower for cellular telecommunications service" as provided for in KRS 278.650. Such a structure, if located outside the jurisdiction of a local planning and zoning commission, requires Commission approval. This formed the basis of Commission Staff's prior opinion that TAG Mobile must acquire a CPCN prior to construction of the proposed tower.

Your first letter was sufficiently clear and detailed enough to allow Commission Staff to determine if the structure that TAG proposed to construct would fall under the Commission's jurisdiction. The additional detail in your December 1, 2014 letter has not persuaded Commission Staff to reverse its opinion that such construction needs Commission approval but confirmed its opinion.

Your request for rehearing notes that the tower, as proposed in the RFP, was intended to "expand the cellular coverage on ECU's campus." The RFP also states that the structure is to be a "high quality telecommunications tower." It is clear from the RFP and the details that you have outlined in both of your letters regarding this matter that the primary purpose of the structure is for "cellular telecommunications service" as referenced in KRS 278.650 and is the exact type of structure for which a CPCN is required under KRS 278.020 and KRS 278.650. Whether or not the structure may have a secondary or auxiliary purpose or use does not change the nature of the tower.

Commission Staff is not persuaded that a company that builds a tower for cellular telecommunications service, but does so without an existing agreement with a utility, is exempt from the obligation to obtain a CPCN. KRS 278.020(1) states, in pertinent part, that:

No person partnership, public or private corporation, or combination thereof shall . . . begin construction of any plant, equipment, property, or facility for furnishing to the public any of the services enumerated in KRS 278.010

It appears to Commission Staff that a "high quality telecommunications tower" is a facility that is used (or is to be used) for furnishing for the public the service enumerated in KRS 278.010(3)(e). Therefore, construction of a communications tower, if outside the jurisdiction of a local planning and zoning commission, should not begin without prior Commission approval, regardless of whether or not the entity constructing the communications tower is a utility as defined by KRS 278.010(3)(e). Although neither KRS 278.020(1), nor KRS 278.650 requires that a utility be the applicant for construction of a facility, they require that a CPCN be issued prior to construction beginning.

In determining whether or not proposed construction meets the public convenience and necessity, the Commission weighs many factors including, but not limited to, the need for the new facility in order to meet service requirements and whether or not the new facility would cause unnecessary duplication of services. See, *Kentucky Utilities Co. v. Pub. Serv. Com'n*, 252 S.W.2d 885, 889-890 (Ky. 1952). For communications towers, the Commission must consider these standards and also consider the requirements enumerated in KRS 278.650 and 278.665. The Commission promulgated 807 KAR 5:063 to establish the minimal filing requirements not only to meet these statutory requirements, but also to assist the Commission in determining whether the proposed tower is justified by the public's convenience and necessity. Although the provisions of 807 KAR 5:063 address the filing requirements for a utility, which is the entity that is typically involved in the construction of these towers, the statutory requirements are broader and apply to any person proposing the construction. Thus, the statutory requirements, in combination with the provisions of 807 KAR 5:063,

provide notice to an applicant of the type of information needed to support an application seeking the issuance of a CPCN to construct a communications tower.

Commission Staff also notes that in reviewing several CPCN applications for construction of a communications tower, where a non-utility and utility are co-applicants, it is often the non-utility that supplies the required information. Commission Staff is unaware of any instance in which the Commission has rejected the information filed because it was not filed by a utility.

Regarding your contention that had TAG applied for a CPCN, it would have done so as an entity other than a utility, acting on its own without a formal relationship with a cellular telephone provider, and thus TAG would have been the first such entity ever required to apply for a CPCN under those circumstances. Commission Staff acknowledges that in all prior CPCN cases for communications towers, a utility was individually or jointly an applicant. However, the fact that no prior applications of this type have been filed solely by a nonutility does not vitiate the statutory requirement that a CPCN be obtained prior to beginning construction of a communications tower utilized to provide service for the public. Here, it was clear that EKU's intent was to eliminate the buildings on which cellular antennas were currently located, and those cellular antennas would need to be moved to a new location.

Commission Staff concludes that TAG should have obtained a CPCN prior to building the tower. TAG could have applied for the CPCN in one of two ways: (1) by applying for a CPCN pursuant to KRS 278.020, KRS 278.650 and 807 KAR 5:063; or, (2) by applying as a co-applicant with a utility. Absent either of these two actions, and Commission approval, TAG should not have started construction of the tower on EKU's campus. If Commission Staff were to conclude otherwise, it could potentially allow wireless carriers to circumvent the statutory CPCN requirements for the construction of wireless communications towers.

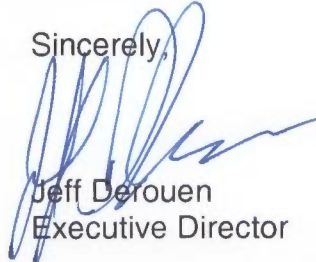
Commission Staff notes that the circumstances surrounding the construction of this tower are unique. First, it is being built at the behest of a state institution. Second, it is being built on state property which is exempt from local planning and zoning, even if the site is located within the political boundary of a planning and zoning commission. Third, construction began on a speculative basis to the extent there was no pre-existing contract with a utility guaranteeing colocation. Commission Staff also notes that TAG, according to the construction sites listed on its website, has only built towers in Kentucky in counties that have adopted county wide planning and zoning. Therefore TAG has had no prior cause to apply to the Commission for a CPCN for other construction projects. However, the uniqueness of the circumstances does not excuse TAG's actions in not applying for a CPCN.

You have also requested guidance as to what steps TAG should take if Commission Staff does not reverse its original opinion. As to that, Commission Staff can offer no guidance. Commission Staff is unaware of any instance of the Commission

issuing a CPCN *ex post facto*. Therefore, there is no reason for TAG to now apply for a CPCN if the tower is now constructed. Commission Staff notes that the Commission retains the authority to investigate violations of KRS Chapter 278 at its discretion, as well as assess the appropriate penalties if violations are found.

This letter represents Commission Staff's interpretation of the law as applied to the facts presented. This opinion is advisory in nature and is not binding on the Commission should the issues herein be formally presented for Commission resolution. Questions concerning this opinion should be directed to J.E.B. Pinney, Staff Attorney, at (502) 782-2587 or Nancy Vinsel, Staff Attorney, at (502) 782-2582.

Sincerely,



Jeff Derouen
Executive Director

JP/ph